FILE COPY

OCT 5

CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

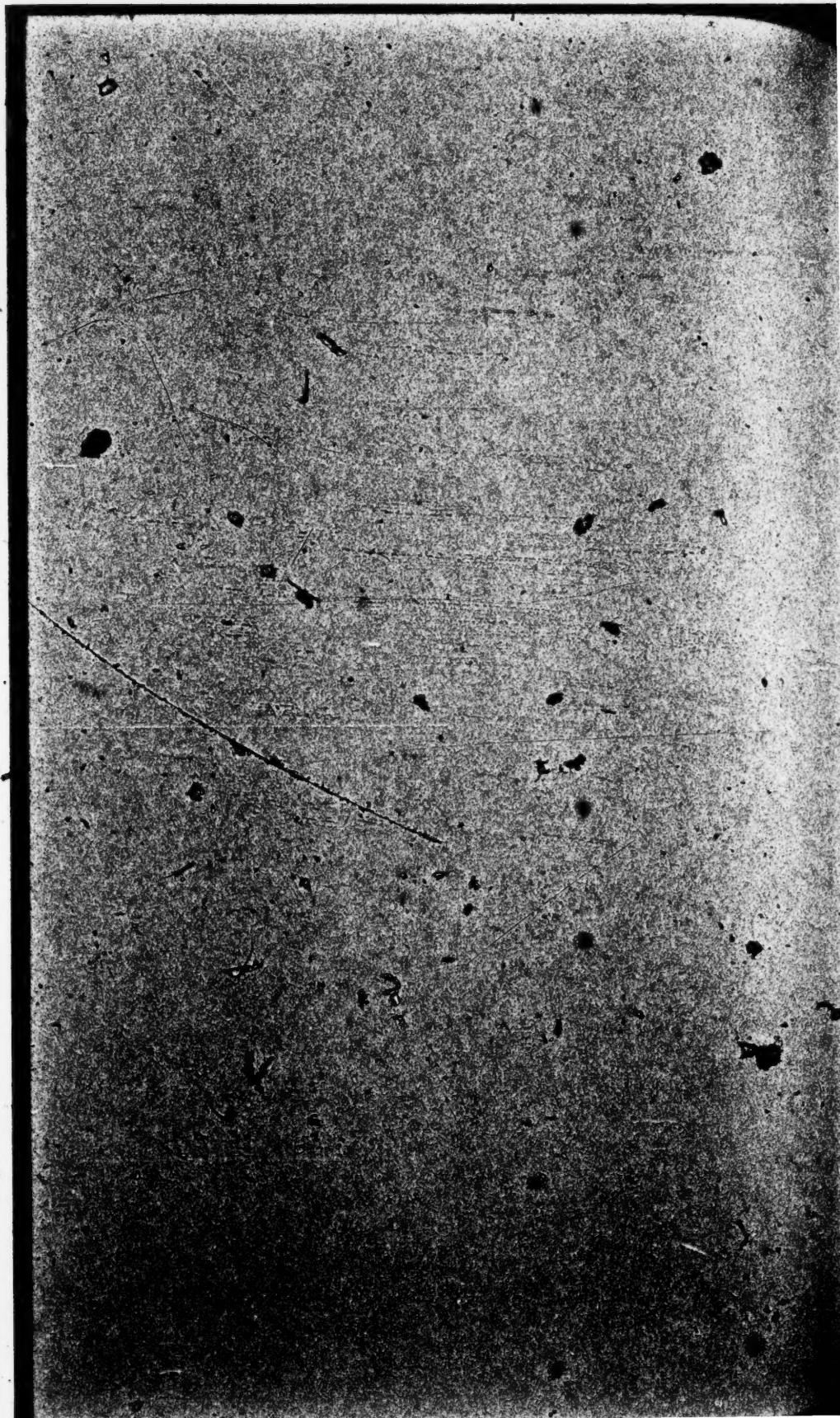
—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUSAN BRANDEIS,
Counsel for Petitioners.

THE COURT PRESS, N. Y. C.



INDEX

Page

Petition for a Writ of Certiorari:

Questions Presented 2

Reasons for Granting the Writ 4

Brief in Support of Petition for Writ of Certiorari:

The Opinions Delivered in the Court Below 9

Grounds of Jurisdiction 9

Summary Statement of Matter Involved 10

Facts 10

Statutes Involved 11

Specifications of Errors 11

Argument:

POINT I—Section 77B makes provable a claim for "injury resulting from the rejection of an unexpired lease of real estate" as an alternative to and separate and distinct from a claim "for damages or indemnity under a covenant contained in such lease". This is a new right in bankruptcy which is not identical with and does not depend for its existence on a claim enforceable under applicable state law at time of filing the petition 13

POINT II—The claim for injury resulting from the rejection of a lease is expressly made to survive surrender 16

POINT III—Granting a provable claim for injury resulting from the rejection of a lease does not violate the constitution 18

POINT IV—The claims reserved in the nine qualified releases herein were those made provable by Section 77B 20

Appendix 23

CITATIONS

Cases:

Central Funding Corp., In re, C. C. A. 2nd, 75 Fed. 2nd, 256 .... 19n

City of Chelsea v. *Dolan*, 24 F. (2d) 522 ..... 19n

Frazin, In re, 183 Fed. 28, 32 ..... 3n

Gray v. *Kaufman Dairy & I. C. Co.*, 162 N. Y. 388, 394 ..... 17n

Page

Hermitage Co. v. *Levine*, 248 N. Y. 433..... 14n

Inland Dredging Corporation, In re, 61 F. (2d) 765..... 19n

Manhattan Properties, Inc. v. *Irving Trust Co.*, 291 U. S. 321 .....14n, 17n, 19n

Northern Pacific Railway Co. v. *Boyd*, 228 U. S. 482.....15n, 16n

Paramount Publix Corp., In re (*Greenberg* v. *Paramount Pictures Inc.*), C. C. A. 2nd Cir., July 20, 1936, not yet reported.... 20n

Prudence Bonds Corp., In re, C. C. A. 2nd, 75 Fed. 2nd, 262..... 19n

United Cigar Stores Co. of America, In re (*Kuhner-Fisher*), C. C. A., 2nd Cir., decided July 14, 1936, not yet reported..6, 7, 16

United Cigar Stores Co. of America, In re (*Meadows*), 83 F. (2d) 207..... 9

United Cigar Stores Co. of America, In re (*City Bank Farmers Trust Co.*), 83 F. (2d) 209..... 9

Van Huffel v. *Harkelrode*, 284 U. S. 225, 227..... 19n

Statutes, etc.:

Bankruptcy Act:

Section 25(c)..... 10

Section 63(a).....14n, 25

Section 77B.....1, etc., 23

Section 77B(b)(10)..... 11

76 Con. Rec. Pt. 2, p. 1360.....4n, 17n

Section 240(a) Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a)..... 9

H. R. 5884, 73d Cong., 1st Sess., print of June 6, 1933, page 10, lines 12-14..... 18n

H. R. 5884, 73d Cong., 2d Sess., print of March 15, 1934, page 10, lines 21-23..... 18n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. .

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Joseph E. Otis Estate Land Trust, together with 93 other petitioners, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on July 6, 1936, affirming, by a divided court, an order of the District Court for the Southern District of New York, disallowing 94 landlords' claims under Section 77B of the Bankruptcy Act "for injury resulting from the rejection of an unexpired lease * * * or for damages or indemnity under a covenant * * * in such lease", "re-

jected by a trustee * * * in a proceeding pending prior to" the enactment of Section 77B, in which reorganization proceedings under Section 77B were subsequently instituted.

Questions Presented.

1. Whether Section 77B of the Bankruptcy Act makes provable "the claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate" as a new right in bankruptcy, separate and distinct from any claim "for damages or indemnity under a covenant", and which is not identical with and does not depend for its existence on a claim enforceable under applicable State law at time of filing the petition.[1]

2. Whether in proceedings under Section 77B of the Bankruptcy Act a landlord may prove a claim for injury resulting from the rejection of his lease in the prior bankruptcy proceeding in which the 77B petition was filed when the landlord after rejection and "before * * * the filing of the petition" and the enactment of Section 77B has obtained possession by the "surrender of the premises to the landlord or * * * reentry of the landlord."[2]

[1-2] Determination as to the following claims herein depends squarely upon these questions:

Number	Claim	3 Year Claim
5235	Excell Trustees	$28,382.92 (R. 480)
5277	Wm. E. and Warren H. Munk	46,707.33 (R. 251)
5286	Simon Lorch	107,941.99 (R. 317)
5302	Louise S. Whitcomb and Florence Welch	12,661.11 (R. 446)
5304	Abe and Myrtle Schwartz	62,626.08 (R. 241)
5312	Isidor A. and Flora L. Rubel	49,127.33 (R. 405)
5341	Thos. H. Brown *et al.*	103,917.10 (R. 380)
5406	Herbert and Sigmund Livingston, as Trustees	24,567.36 (R. 354)
5421	J. E. Nunn	33,696.35 (R. 344)

These questions are also fundamental in determining the remaining 85 claims.

3. Did the majority of the Court of Appeals err in holding, in four of the 94 claims, that the landlords had no provable claims under Section 77B where the trustee in the prior bankruptcy proceedings in which the 77B proceedings were taken, had rejected[3a] or had not affirmed[3b] the leases[3c] and the landlords had obtained possession of their premises under agreements providing (a) that the landlord should take possession of the premises and that the trustee and the bankrupt should be released from all claims, but (b) that nothing in the agreements should constitute a waiver[3d] by the landlord of the right "to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled".

4. Did the majority of the Court of Appeals err in holding, in 6 of the 94 claims, that the landlords had no provable claims under Section 77B where the Trustee in the prior bankruptcy proceedings in which the 77B proceedings were taken had rejected[4a] or had failed to affirm[4b] the leases[4c] and the landlords had obtained possession of their premises under agreements providing in effect for surrender of possession to the landlord and the release of claims against the

---

[3a] 5406 Herbert and Sigmund Livingston, as Trustees.
5341 Thos. H. Brown, *et al.*

[3b] 5286 Simon Lorch.
5312 Isidor A. and Flora L. Rubel.

[3c] A trustee does not "reject" but merely fails to affirm (*In re Frazin*, 183 Fed. 28, 32). It is submitted that the making of the agreements herein constituted a rejection even in cases in which the lease was not formally rejected.

[3d] In the Rubel and Livingston claims by express language; in the Lorch claim by providing against merger and in the Brown claim by assignment to a party other than the landlord.

[4a] Nos. 5235, 5277, 5302, 5341, described more particularly in footnote 1, page 2.

[4b] Nos. 5304 and 5421, described more particularly in footnote 1, page 2.

[4c] See note [3c] *supra*.

Trustee and the bankrupt, but further providing that the release should not "be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled."

5. Where a lessor by agreement with an adjudicated bankrupt tenant yields up rights against the bankrupt tenant and its estate in bankruptcy, and a new law (77B) is subsequently enacted creating a new status for landlords' claims and for the rights of the bankrupt with respect to the bankrupt estate, can the bankrupt avail itself of this new status with respect to its estate without also permitting the landlord to assume a new status with respect to the bankrupt (debtor) estate, despite the agreement made in the prior bankruptcy proceedings before the enactment of the new law?

Reasons for Granting the Writ.

The question of the proper interpretation of the provisions of Section 77B relating to landlords' claims is an important question of Federal Law which has not been, but should be, settled by this Court.

This question is substantial. It is involved both in all the many bankruptcy proceedings of corporations operating chain stores pending at the time when Section 77B was enacted, which were initiated largely to relieve such corporations from liabilities under leases[5] and the many reorganization proceedings of similar corporations since the enactment of Section 77B. It is desirable that this Court should pass upon these provisions at this time for the guid-

[5] Congressman Celler (76 Con. Rec. Pt. 2, p. 1360).

ance of Bench and Bar and to assure uniformity of interpretation among the various Circuits.

The decision of the Circuit Court of Appeals herein raises two issues going to the essence of landlord's claims under Section 77B of the Bankruptcy Act.

(a) 77B provides for landlord claims "for injury resulting from the rejection of an unexpired lease of real estate **or** for damages or indemnity under a covenant contained in such lease". The decision herein limits the law to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 787). Under this ruling, in effect, only "damages or indemnity under a covenant" may be claimed as only such claims are recognized by "the substantive law of landlord and tenant". "Injury resulting from the rejection of an unexpired lease," despite the express language of the statute, is ruled out of it.

The ruling of the Court of Appeals not only vitally affects a great group of landlord claims herein[6] (R. 2 to 5) and in other 77B proceedings but leaves reorganization under 77B in confusion. If the rejection of leases containing no covenant of indemnity gives the landlord no claim in 77B, the tenant-debtor must continue bound by the lease as was formerly the case under the Bankruptcy Act before the passage of 77B, unless the landlord's rights have been unconstitutionally destroyed entirely. Such continued liability of the tenant-debtor would render its reorganization difficult or, in those cases where

[6] The three year claims of the 94 petitioners herein amount to $1,667,995.66. Similar claims in these proceedings far in excess of this depend on the outcome of this appeal by stipulation or by reason of similarity of the facts.

lease difficulties precipitated the 77B proceedings, impossible. Obviously one major purpose of 77B was to marshall all possible claims against the tenant-debtor,—even those of stockholders,—in one proceeding so that the debtor might be completely and effectively reorganized. If the ruling herein is correct with its corollary that the tenant-debtor remains bound by leases for whose rejection no claim may be made in 77B, that object has failed.

(b) Under the decision of the Circuit Court of Appeals provable claims in 77B do not survive surrender of the premises and re-entry. The statute, however, provides that the amount of a landlord's claim for rejection shall be limited to an amount not to exceed the rent reserved by the lease for the three years next succeeding "the date of surrender of the premises * * * or the date of re-entry * * * whether before or after the filing of the petition." In short, the statute says the amont of a landlord's claim shall be measured from the date of the happening of an event which the Court herein has said destroys the claim. Obviously this issue is a vital one occurring in every 77B proceeding which involves a lease, which is the equivalent of saying in every one.

If additional grounds for granting certiorari herein be necessary, they are furnished by the decision of the same Court (the Circuit Court of Appeals for the Second Circuit) in this same proceeding *In re United Cigar Stores Co. of America* (*Kuhner-Fisher*) decided July 14, 1936 not yet reported. In that case the same Court *allowed* a landlord's claim although that landlord had no claim against the debtor "which the substantive law of landlord and tenant recognizes as an enforceable claim." That decision (discussed in the brief ap-

pended hereto) is in conflict with the decision herein and further confuses the law on this subject.

That certiorari should be granted here is indicated by the statement of Judge Learned Hand in writing for the Court in the above-mentioned Kuhner-Fisher case when, referring to the provisions of 77B relating to landlord claims and the Congressional bills out of which they arose he says "It is very difficult to know what the section really means as it finally did emerge."

WHEREFORE, it is respectfully submitted that this petition should be granted.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
by SUSAN BRANDEIS,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Delivered in the Court Below.

The Special Master's Report is found at R. 739.

There was no opinion in the District Court.

The majority and dissenting opinions in the Circuit Court of Appeals are reported in 83 F. (2d) 202 and are found at R. 780, 788.

The petition to the Circuit Court of Appeals for rehearing on behalf of certain appellants is found at R. 791. The majority opinion in the Circuit Court of Appeals on the petition for rehearing is found at R. 803.

The opinions in cases of similar issues, heard and decided at the same time, and in which petitions for writs of certiorari are now pending, are reported as follows:

In re United Cigar Stores Co. of America (Mrs. John S. Meadows, appellant), 83 F. (2d) 207 (Petition for Writ of Certiorari—No. 151, October Term, 1936);

In re United Cigar Stores Co. of America (City Bank Farmers Trust Co., appellant), 83 F. (2d) 209 (Petition for Writ of Certiorari—No. 260, October Term, 1936).

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a) and Sec-

tion 25(c) of the Bankruptcy Act. The order for mandate was entered April 13, 1936 (R. 791). The petition for rehearing was denied by order of the District Court filed July 6, 1936 (R. 806).

Summary Statement of Matter Involved.

Facts.

The United Cigar Stores Company of America, a New Jersey Corporation, owned a chain of retail stores national in its scope. It held about 1,000 burdensome leases, which constituted one of the reasons for its financial difficulties, and resulted in the filing of a voluntary petition in bankruptcy on August 29, 1932 (R. 501-505). The Irving Trust Company, the Trustee in bankruptcy of the Debtor, made new agreements with many of the landlords, and abandoned other leases, using printed forms of agreements in most cases (R. 505, 508) (Claimant's Exhibits 1, 2, 3, 4, 5, 6, R. 65, 70, 76, 80, 86, 90). The form agreements usually used recited the bankruptcy of the United. About 630 new leases with landlords were negotiated upon these forms (R. 744). A number of these landlords have filed claims in these proceedings. Many have stipulated to abide by the result of the court's decision in the instant appeal. The agreements variously provided for modification and/or assignment of the old leases and for a release of the landlord to the trustee, the bankrupt, and the bankrupt estate (R. 506, 7, 8). In nine cases the lessors did not waive the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled (R. 241, 251, 317, 344, 354, 380, 405, 446, 480). In 85 cases the landlord gave up rights against the bankrupt and the bankrupt estate.

On June 7, 1934 Congress enacted Section 77B as an amendment to the Bankruptcy Act, after the execution of all 94 assignment agreements.

On June 9, 1934, while the prior bankruptcy proceeding was still pending, the bankrupt filed its petition under the newly enacted Section 77B. In due course the bankruptcy proceedings were succeeded by the new 77B proceedings, and the bankruptcy estate became the debtor's estate in 77B proceedings.

The 94 landlord appellants filed claims in the 77B proceedings pursuant to the provisions of 77B (b) (10) for "injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant" in such a lease, for injury or damages incurred in a proceeding pending prior to the institution of proceedings under 77B.

The Special Master recommended that the claims be disallowed (R. 739), and his report was confirmed by the District Court (R. 752). A majority of the Court of Appeals affirmed (R. 780, 788). A petition for rehearing was denied on July 6, 1936 (R. 803).

Statutes Involved.

The statutes are set out in an appendix at pages 23 to 25.

Specifications of Errors.

The Circuit Court of Appeals erred in finding that:

1. 77B changed only the remedy as to the proof of claims, and not the right of claimant.

2. A reservation of a right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled, is not a reservation of rights to prove future rent claims against the estate of the debtor in reorganization under a subsequently enacted statute (77B) invoked by the bankrupt.

3. The qualifying riders preserved only then present rights in bankruptcy, but not rights recognized by any change in the bankruptcy law which Congress might make in the future.

4. The reservations in nine claims reserved future rent claims made provable by judicial determination but not by subsequent legislation.

5. The bankrupt could change its status with relation to its bankruptcy estate by the application of 77B proceedings, to the exclusion of the landlord from a new status in the 77B proceedings, the exclusion based on an agreement with the bankrupt made *prior* to enactment of 77B.

6. The debtor may avail itself of defenses acquired as a bankrupt in bankruptcy proceedings pending prior to the enactment of 77B, in proceedings subsequently brought by the bankrupt under 77B.

7. A claim for damages did not relate back to the lease, under a proper construction of the statute.

8. None of the claims arose from the rejection of leases.

9. A surrender and acceptance resulted from the assignment by the tenant-bankrupt to a person other than the landlord.

10. In affirming the order of the District Court.

Argument.

POINT I.

Section 77B makes provable a claim for "injury resulting from the rejection of an unexpired lease of real estate" as an alternative to and separate and distinct from a claim "for damages or indemnity under a covenant contained in such lease". This is a new right in bankruptcy which is not identical with and does not depend for its existence on a claim enforceable under applicable state law at time of filing the petition.

The majority of the Court of Appeals based its decision herein on the proposition:

> "While it is plain that claims for future rent are provable in 77B reorganization proceedings where they would not have been under the Act as it stood previously, it is equally plain that whatever change in this respect was made had to do only with the remedy. It is necessary to have a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim in order to have a provable claim under Sec. 77B. That section does not extend the liability of a lease beyond what it otherwise would be under applicable law."

The majority of the court goes on to state by inference that the claims provable under 77B are only the identical claims which the landlords would have outside of bankruptcy. Your petitioners submit that this is an erroneous interpretation of a vital point in the law, the text of which is set out below.[7]

---

[7] The Act expressly provides that for all purposes thereof "any person injured" by the "rejection" (whether in a 77B proceeding or a proceeding pending prior to the institution thereof), of an "unexpired lease" shall be "deemed to be a creditor". "Creditors" are defined as including "all holders of claims of

(Continued on page 14.)

True, the landlords may have, or may be able to create by re-entry, claims under their leases which are presently enforceable under applicable state law. If the lease contains a covenant under which the parties have created, in place of the rent obligation,[8] a new "claim against the debtor which the substantive law of landlord and tenant recognizes as an enforceable claim", Section 77B makes that claim provable (subject to the three years limitation).

But the landlord may be injured without having such a claim:

(a) where the lease contains no covenant or

(b) where the covenant is in such form that the substantive law of landlord and tenant does not recognize it as enforceable, except at an impossibly remote period,[9]

or conversely, the landlord may refuse to act under the lease and attempt to enforce the tenant's continuing liability for rent, which survives rejection, a

---

whatsoever character against the debtor or its property". *I. e.*, creditors are holders of claims and a "person injured" by the rejection of an unexpired lease, being a creditor, is the holder of a claim.

Having definitely classified landlords under rejected leases as creditors, the Act then goes on to define the rank and the extent of their claims as follows:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate *or* for damages or indemnity under a covenant contained in such lease shall be treated as a claim" ranking with 63(a) debts, but shall be limited to the rent "reserved by said lease for the three years next succeeding the date of *surrender of the premises to the landlord or* the date of reentry of the landlord, whichever first occurs, *whether before or after the filing of the petition,* plus unpaid rent accrued up to such date of *surrender or* reentry."

[8] *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 321, 338.

[9] *Hermitage Co.* v. *Levine*, 248 N. Y. 433.

procedure which would at least seriously interfere with reorganization.

Since, under the Bankruptcy Act prior to Section 77B, the claims for rent, or under such a covenant, continued to exist against the tenant-bankrupt, and since the tenant-bankrupt no longer had an interest in the estate, no provision for such claims in bankruptcy was necessary.

But to effect reorganization, the reorganizer must be able to relieve the tenant-debtor of these continuing claims, even against the will of the landlord. Arbitrarily to destroy them would violate the due process clause. Furthermore, to permit participation by stockholders without provisions for landlords' claims would raise serious constitutional questions under the *Boyd* case.[10] Section 77B had therefore to provide both for termination of this interest and for compensation to the landlord on such termination.

Section 77B effected this result and at the same time eliminated the foregoing questions as to the constitutionality of the statute by providing for claims in the alternative against the debtors assets. Where, as a practical matter, the landlord's claim can be measured by the agreements of the parties, Section 77B enforces such agreements by giving a claim "for damages or indemnity under a covenant". But where the damages cannot be determined by application of the State law, Section 77B gives an alternative claim "for injury resulting from the rejection". That this alternative claim for injury is constitutional is argued under Point III hereof.

Refusal of the majority of the Court of Appeals to interpret the Act in this manner renders nugatory the alternative provisions for landlords' claims and the grant of a claim when the lease "shall have been

---

[10] *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482.

rejected by a trustee * * * in a proceeding pending prior to * * * a proceeding under this section", measured from the date of surrender or re-entry.

The result arrived at is the more astonishing, since the same Circuit Court of Appeals in another claim in this proceeding (*In re United Cigar Stores Co. of America* (*Kuhner-Fischer*), *C. C. A. 2nd Cir.* July 14, 1936, not yet reported) *did* allow a claim, although the landlord had no "claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim." In that case, liability had accrued by the landlord's re-entry under a covenant of indemnity in the lease. The covenant provided that the tenant would "indemnify the landlord against all loss for rent which the landlord may incur by reason of such termination during the residue of the term." Under this form of covenant the State law granted no relief until the end of the original term of the lease.[11] *The Court did not grant damages or indemnity under the covenant, but instead gave the alternative claim for injury resulting from rejection, by liquidating the claim like a claim for damages for breach of an executory contract; that is by discounting the future payments and subtracting the appraised value of the term from their sum.*

In the *Kuhner Fischer* case, the Court correctly applied Section 77B. But it construed the statute in direct contradiction to its application of Section 77B herein.

POINT II.

The claim for injury resulting from the rejection of a lease is expressly made to survive surrender.

Section 77B provides that a landlord's claim for rejection shall be limited to an amount not to exceed

[11] *Hermitage Trust Co. v. Levine*, 248 N. Y. 433.

the rent reserved by the lease for the three years next succeeding "the date of surrender of the premises[12] * * * or the date of re-entry * * * whether before or after the filing of the petition." Since the claim is measured from the date of surrender or re-entry, surrender or re-entry is a condition precedent to proving the claim.

Until surrender or re-entry, there can be no claim against the assets because, until the debtor's or the trustee's failure to affirm, the debtor continues to be liable for rent. Only upon the termination of this continuing liability can it be determined whether the landlord has been injured at all,[13] and, if injured, to what extent.

Congress carefully provided in Section 77B that the claim of landlords made provable thereby should include landlords of corporations already in bankruptcy at the passage of the Act. An important reason for the inclusion of landlords' claims was the series of then pending bankruptcy proceedings instituted largely to dispose of lease liabilities.[14] The Act, by its terms, leaves no room for doubt on the subject. In addition to measuring the amount of the landlords' claim from the date of surrender or re-entry "*whether before or after the filing of the petition* * * *", it is provided that the landlord should have a claim in the event that his lease "shall have been rejected by a

[12] The phrase "surrender of the premises" is the equivalent of surrender of the term. *Gray* v. *Kaufman Dairy & I. C. Co.*, 162 N. Y. 388, 394 (cited by the majority opinion in the instant *Otis* case).

[13] *Manhattan Properties Inc.* v. *Irving Trust Co.*, 291 U. S. 321, 331.

[14] The Celler Bill making landlords' claims provable in bankruptcy, introduced by Representative Celler, was directed particularly against the United Cigar Stores bankruptcy among others. 76 Congressional Record, Part II, page 1360.

trustee or receiver in bankruptcy * * * *in a proceeding pending prior to the institution of a proceeding under this section* * * *". It provided also (Sec. 77B (p)) that reorganization proceedings could be "taken in proceedings in bankruptcy * * *" pending on the effective date of Section 77B.

The fact that Congress intended landlords' claims to survive surrender, particularly in pending bankruptcies, further appears from the circumstance that as originally passed by the Senate, the Act provided:

> "In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed *provided such contract shall not have been terminated by forfeiture, reentry or otherwise.*"[15]

The contrast between this bill and the Act as finally passed makes the Congressional intent entirely plain.

POINT III.

Granting a provable claim for injury resulting from the rejection of a lease does not violate the constitution.

Section 77B regulates the distribution of the assets of a debtor in the possession of the Bankruptcy Court. It does not attempt to change the substantive law of landlord and tenant.

No constitutional rights of a debtor or of any creditors or stockholders are violated by granting the

---

[15] H. R. 5884, 73d Cong., 1st Sess., print of June 6, 1933, page 10, lines 12-14; H. R. 5884, 73d Cong., 2d Sess., print of March 15, 1934, page 10, lines 21-23.

landlord the right to prove a claim for damages sustained by him because of the rejection of his lease.

It is well settled that Congress, in the exercise of the bankruptcy power, may both authorize the enforced transfer or the sale of collateral security free from liens thereon[16] and provide for priorities.[17] Exercise of such powers necessarily changes the rights which creditors would have under applicable State law, and in the interests of equitable distribution provides for the application of assets to discharge claims in an entirely different manner from the State law. Creditors are thereby deprived of substantial rights, but since the deprivation is incidental to the bankruptcy power, the constitution has not been violated.

In Section 77B, Congress has merely granted landlords the right to participate with other creditors in the debtors' assets in reorganization, in place of the corresponding claim which they had against the debtors' assets prior to reorganization, and of which they were deprived when the Bankruptcy Court took possession of such assets. It seems clear that Congress has power to do this. This Court has already stated that Congress may make claims for future rents provable.

> "The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act."[18]

This reasoning is *a fortiori* true when applied to estates which were in bankruptcy at the time Section

---

[16] *In re Central Funding Corp.*, C. C. A. 2nd, 75 Fed. 2nd, 256; See *In re Prudence Bonds Corp.*, C. C. A. 2nd, 75 Fed. 2nd, 262; See *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 227.

[17] *In re Inland Dredging Corporation*, 61 F. (2d) 765; *City of Chelsea* v. *Dolan*, 24 F. (2d) 522.

[18] *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 321, 332.

77B was passed. The proceeding under Section 77B is "an amplification or new end product of the original bankruptcy just as though the bankrupt or alleged bankrupt had proposed a composition".[19] The debtor had no constitutional right to reorganize under Section 77B. Congress could have provided that the Section was effective only as to corporations not in bankruptcy. It therefore could impose as a condition of the debtor's enjoying the benefits of the Section, a recognition of landlords' claims. This is all that it did.

POINT IV.

The claims reserved in the nine qualified releases herein were those made provable by Section 77B.

Three landlords herein repossessed their premises under agreements which "expressly provided against the waiver of whatever right to prove the claims against the bankrupt estate the bankruptcy court might decide that they had" (Op. on Petit. for Rehearing, R. 804).[20]

Six additional landlords repossessed their premises under agreements providing for surrender of the premises to the landlord, and for the release of the bankrupt and the trustee from all liability, but with a rider to the release provision, the typical form of which provided:[21]

> "Nothing in this article shall be deemed a waiver by the Landlord of the right to prove

---

[19] *In re Paramount Publix Corp.; Greenberg* v. *Paramount Pictures Inc.*, C. C. A. 2nd Cir., July 20, 1936, not yet reported.

[20] Nos. 5286 (Lorch), 5312 (Rubel), and 5406 (Livingston).

[21] Nos. 5235 (Excell); 5277 (Munk); 5302 (Whitcomb); 5304 (Schwartz); 5341 (Brown), and 5421 (Nunn).

against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable one which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the Trustee from contesting such proof and allowance."

Judge A. Hand, in his dissenting opinion below (R. 788, 83 Fed. (2d) 202, 206), held that the effect of this rider was "to reserve against the bankrupt's estate any claims which existed but for the surrender and general release" (R. 789, 83 Fed. (2d) 207). The Special Master (R. 745) made the same ruling, but held that the landlords intended to reserve the claims if judicial decision made them provable but not if legislative sanction did so. Judge Hand was unable to perceive this fine distinction. Your petitioners submit that the ruling of the majority is a flat contradiction of the plain words and obvious intent of the parties.

Although this question alone may not be sufficient reason for this Court to grant certiorari herein, your petitioners urge it as substantial additional grounds for the writ.[22]

The nine qualification claimants did release the bankrupt, which remained as an empty shell after the bankruptcy, but reserved all rights against the bankrupt's assets.[23] Two days after 77B was enacted,

---

[22] The nine claims total $469,627.57 (three year claims). Additional claims greatly in excess of this amount are to be expunged if this petition is denied, or will be vitally affected by the decision herein.

[23] They signed, under urgent solicitation by the Trustee, agreements prepared by the trustee. By thus complying with the trustee's wishes, they have, it has so far been held, deprived themselves of the rights given landlords who refused to cooperate with the Trustee but resorted to legal action.

the bankrupt (become the debtor) stepped into the zone of reorganization, a small area in the bankruptcy domain. It claims, so far successfully, that by so doing it freed assets subject to the claims in the bankruptcy proceeding from such claims in a subsidiary proceeding "taken in" the bankruptcy proceeding.

Your petitioners believe that the decision below violates the agreement of the parties, the proper interpretation of Section 77B, and the plain equities of the situation. They pray for an opportunity to argue this question from the text of the agreements and the Bankruptcy Act as they cannot do here because of space limitation.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

APPENDIX.

(1) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended July 7, 1934, C. 424, 48 Stat. 912; as amended August 20, 1935, C. 577, 49 Stat. 664; August 29, 1935, C. 809, 49 Stat. 965:

"SEC. 77A. *Additional Jurisdiction.*—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act" (U. S. C. A., Title 11, Sec. 206).

"SEC. 77B * * * (b) * * * (10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim

ranking on a parity with debts which would be provable under section 63(a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *" (U. S. C. A., Title 11, Sec. 207).

"SEC. 77B * * * (o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved" (U. S. C. A., Title 11, Sec. 207).

"SEC. 77B * * * (p) This section shall take effect and be in force from and after the date of the approval of this amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act" (U. S. C. A., Title 11, Sec. 207).

(2) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:

"SEC. 12 (e) Upon the confirmation of a com-

position, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided" (U. S. C. A., Title 11, Sec. 30).

"SEC. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate" (U. S. C. A., Title 11, Sec. 103).